

The California Tomato Commission's
Response to the CDFA's
Draft Audit Report

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1. INTRODUCTION AND REQUEST RE PUBLIC RECORD

The California Tomato Commission submits the following response to the Draft Audit Report of the California Department of Food and Agriculture Audit Office dated December 15, 2006 (Audit Report #06-070) and requests that the entirety of its response, together with all accompanying exhibits, be made part of the public record.

2. PRELIMINARY STATEMENT

The California Tomato Commission has investigated the reported findings made by the CDFA Audit Office and considered its recommendations. Throughout its history, the Commission has endeavored to comply with its statutory mandates, improve the California fresh tomato industry, and serve the public interest. Consistent with the Commission's enduring commitment and good faith in discharging these duties, the Commission voluntarily will agree to the majority of the CDFA's recommendations, notwithstanding its reasonable disagreement and dispute with many of the findings which form the basis of those recommendations. (*See infra*, Response to Key Recommendations.)

The Commission addresses the CDFA's specific findings and recommendations in detail below. However, the Commission also contends that the following general factors are

material to its response and should be considered by the CDFA in making its final determinations.

As set forth in the Commission's governing statute, its purpose is to promote the California fresh tomato industry. *See, e.g.*, Cal. Food & Agr. Code § 78604 (. . . the Commission is necessary to carry out the California tomato industry's commitment to the efficient development and management of a national and international advertising and promotion program which, combined with the research program, will enhance the competitiveness of the California tomato industry within the national and international marketplace.") and § 78605 ("continue and enhance . . . research . . . resulting in increased consumer value and enhanced grower returns"). Importantly, section 78610 emphasizes the need for the Commission to create new markets:

Opportunity exists for continued growth and expansion of the tomato industry by creating new markets in major portions of this country. The success of such an expansion program is uniquely dependent upon effective advertising, promotion, and research, since the creation of new markets is essentially a matter of educating and informing people of the use, nutritional value, and availability of the commodity. The expansion of the tomato industry also provides an important source of jobs for many people in this state, a high proportion of whom reside in historically depressed areas of the state, and serves to ensure the preservation of an agrarian society.

The Commission's mandate to promote a commercial product ("uniquely dependent upon effective advertising, promotion, and research") and open new markets, of course, distinguishes it from a traditional government agency.

It is virtually undisputed in the agricultural industry that commissions generally were created to operate, and have operated, in a business-like environment that is different from that in a government agency or a marketing order. Based upon the Audit Report, it appears that the Commission is being held to strict standards applicable to a government agency, funded by general tax revenues instead of by assessments from the industry itself. The auditors have exhibited little appreciation of how certain events and activities, about which they express skepticism, promoted fresh tomatoes in California commerce and served the statutory purpose for which the Commission was created. While the Commission does not necessarily object to the CDFA imposing "government" standards equally upon all commissions going forward in the future, it does object to being singled out in hindsight for a purported failure to comply with government standards to which it reasonably did not understand it was subject.

This is especially true given the virtual absence of any meaningful guidance or oversight from the CDFA since the Commission's inception through the audit period. There have been no comprehensive or clear mandates from the CDFA to inform commissions as to the government standards with which they are expected to comply. The Tomato Commission's statute, for example, expressly requires compliance with the Public Records Act and The Bagley-Keene Act (open meetings), but is silent as to a vast array of other government-related laws and regulations. Moreover, there have never been any material objections by the CDFA specific to the Tomato Commission's programs during the entire audit period or prior. On the contrary, the CDFA routinely has been represented at Commission Board meetings and, without exception, the Secretary or his representative, Lynn Morgan, has concurred with the Commission's budgets. The CDFA representative was present at all but the most recent Board and Executive Committee

meetings where issues or decisions which now are being criticized were not questioned, much less challenged, at the time. Taken together, the prevalence of a business culture in commissions and the absence of oversight or objection by the CDFA make much of the criticism in the Draft Audit Report fundamentally unfair.

Finally, the auditors make reference in the Report to various total amounts expended in certain categories, often in the hundreds of thousands of dollars, where only a portion of the total actually raises any question, this is misleading. The Commission clarifies amounts in issue throughout its Response. During the time period covered by the audit, approximately 44 months, total expenditures of the Commission amounted to roughly \$7 million. Of that amount, the Commission has approximated that only 1% of those expenditures are actually at issue in the Audit Report. This amount is immaterial by most standards but, in any event, is hardly an indicia of a pervasive misuse of funds as implied in the Audit Report. Indeed, the total cost of this audit, including branch charges and professional fees, will exceed the amount of reimbursable items and result in little, if any, real benefit to the industry or public.

For these reasons, and mindful of its substantial achievements discussed below, the Commission is concerned and aggrieved with the accusatory tone of the Audit Report, particularly in light of the incomplete and, in many cases, inaccurate analysis of the documents and facts previously provided. As stated above, the Commission will, in good faith, cooperate to resolve the CDFA's recommendations even where the Commission believes the recommendations to be unnecessary. But the Commission also expects to receive from the CDFA objective and fair treatment.

3. HISTORY AND ACHIEVEMENTS OF THE CALIFORNIA TOMATO COMMISSION

Because the Audit Report suggests that the Commission has not always operated in the "best public interest," and recommends that it do so in the future, it is important to understand the Commission's achievements for the California fresh tomato industry and the public in general. Relative to its many accomplishments in service of the industry and the public, the reportable findings in the Audit Report may be placed in the proper perspective. A summary of the Commission's history and achievements has been narrated and documented by its former Chief Executive Officer with review and input from staff, and may be found at Exhibit A. Set forth immediately below are highlights from the complete exhibit.

The transition to that of a Commission from The California Tomato Board was largely in response to the decline in applied research available through the University of California and the departure of the tomato breeder at UC Davis. Faced with an uncertain future of securing qualified researchers, the Commission was established to enable research with both public and private entities beyond the UC system that is traditionally linked to marketing orders. Since that time, the Commission entered into research agreements with Asgrow and Harris Moran seed companies, University of Arkansas, BYU, Cornell, Oregon State, and USDA, for research that is of importance specifically to the California fresh industry.

While the Commission was founded primarily to fund production research, its mission has changed as the issues facing the industry have changed. The California fresh tomato industry may represent better than 400 million dollars in sales, however, the industry is actually quite small, with the majority of production centered in the San Joaquin Valley and South Coast, and fifteen firms representing nearly all production. The number of growers has declined significantly with the vertical integration of the industry.

Thus, the Commission is unique in that nearly all firms have been represented on the Commission's Board of Directors in the past five years - including Ace Tomato, EEE Produce, San Joaquin

Tomato Growers, DiMare, Red Rooster, Central California Tomato Growers, Live Oak Farms, Sun Pacific Shippers, Gonzales Packing, OP Murphy and Sons, Deardorff Jackson, and Oceanside Produce. History shows, in 2001, at the time of the public hearing of the California Tomato Commission, there was no opposition to its continuation. In 2006 [prior to the commencement of audit and litigation], very limited opposition from the Salinas Valley was received.

The Commission has achieved a long list of accomplishments in betterment of the industry and service to the public, which are described more fully at Exhibit A. The Commission is proud of these accomplishments, the highlights of which are summarized here:

- *Measuring the success of the program long-term, researcher John Trumble, on contract with the Commission since its inception, estimates that the reduction in pesticide use within the fresh tomato industry directly attributable to the Commission's research effort is 50%.*
- *Over the years, the Commission was successful at obtaining a number of section 18 exemptions for its growers - including for Admire, a less toxic control of whitefly, Tattoo-C, a fungicide for controlling late blight, and Rally, a fungicide for the control of powdery mildew.*
- *For example, in the Salinas Valley, powdery mildew and late blight are major diseases. The problem is of less significance elsewhere, however, the Commission responded to the needs of the Salinas industry (Gonzales Packing, OP Murphy) specifically related to their needs.*
- *In a unique partnership, the Commission organized a number of transplant houses . . . to enable a Section 18 exemption for Tattoo-C, to control late blight . . . The transplant industry volunteered funds . . . As a result of this joint effort, growers were assured of having disease-free transplants.*
- *More recently, the Commission successfully petitioned the U.S. EPA on behalf of its Southern California producers, who produce on a limited amount of agricultural land in San Diego, Orange, and Ventura Counties, to obtain Critical Use Exemptions (CUE), providing for the continued use of Methyl Bromide (MB). . . . [without which] a number of growers stated they would have no alternative but to stop producing.*
- *The Commission was recognized by the U.S. EPA in 2003 as a "Champion" in the area of risk reduction.*

- *And, from this document[*strategic plan for reduction of pesticide use*], has developed guidelines for grower's to manage pests and disease with a reduced level of pesticide use, based upon the concept of Integrated Pest Management. This document was distributed to all growers and shippers under Commission law.*
- *In partnership with USDA, the Tomato Board and/or Commission were funding sources for research that would eventually lead to Japan lifting their 40-year quarantine on U.S. tomato imports. . . . the economic return to the industry has been very significant.*
- *The Commission, working with researcher John Trumble, developed a paper on the potential risk associated with mealy bug infecting fresh tomatoes that was provided to the Mexican government. In response, the government relaxed, then eliminated the quarantine on California tomatoes from Imperial County exported to Mexico.*
- *As a result of Mexico eliminating its phytosanitary restriction on California tomatoes which required tomatoes to be free of stems and leaves, the Commission addressed the interests of specific shippers] The stems and leaves issue was primarily that of three shippers - Central California Tomato Growers, Gonzales Packing, and Sun Pacific Shippers. These three shippers reported significant business in Mexico, and thus, any impediment to free trade had economic consequences to these companies.*
- *Thus, with the lifting of this [phytosanitary] barrier, there is equal access between the U.S. and Mexico for the first time.*
- *In 1999, the Commission funded the first "tomato specific" Good Agricultural Practices (GAP) document, through the efforts of researcher Trevor Suslow. The document has been made available to growers and shippers and has been subject to periodic updates.*
- *The findings [of Dr. Suslow's survey through the research program], confidential to the sheds, detailed weaknesses in their own reduction of microbial contamination, such as salmonella and ecoli, and will enable these operations to improve their own food safety efforts.*
- *In response to the FDA letter [to the Commission re food safety], the Commission created a task force to develop the first national guidance document for fresh tomatoes. The document was presented to FDA and is found on their website: <http://www.cfsan.fda.gov/acrobat/tomatsup.pdf>. The document was drafted in conjunction with FDA and was distributed by the Commission to all growers and shippers in California, made available to retailers, food service, and others in the trade. The document is widely available on the internet as an educational tool as envisioned by FDA. And, the Commission has been praised by FDA for its efforts.*
- *As noted in the transcript of the 2005 Salinas hearing . . . Subway echoed their support of the Commission in the April renewal hearing of the Commission based up the past efforts of the Commission related to food safety.*

- *Because of the uniqueness of tomatoes and increasing competition from Canadian greenhouses, the Commission considered a number of options] One, circa 1999-2000, was the development of a "California grown" campaign at Save Mart Supermarkets that would test consumer acceptance of a program that embraced locally grown product over imported product from Canada or Mexico. The test was so successful that the concept emerged into a State-led effort proposed by the Commission to then Secretary Bill Lyons at the California Tomato Conference held in San Francisco, and to the Agricultural Issues Forum, who helped lead the formation of the Buy California Marketing Agreement.*
- *As noted at the Buy California public hearing, the California industry was under attack, facing severe economic consequences from the dumping of Canadian greenhouse tomatoes in California . . . Through the efforts of the Commission, the BC Vegetable Commission, and Ontario Greenhouse Growers, the anti-dumping action was halted without prejudice. And, there was an immediate increase in market share for California tomatoes in the Western United States due to higher prices for the Canadian product. The resulting benefit to the California growers and shippers was in the millions of dollars.*
- *Through this ad-hoc effort [in leading the formation of the North American Tomato Trade Work Group (NATTWG), comprised of tomato producers throughout North America and attended by representatives of the governments of the three North American trading partners – United States, Canada and Mexico], the California Tomato Commission has been able to help lead a harmonization of arrival standards (grading standards) for U.S. tomatoes shipped to Canada and in the harmonization of pesticide MRL's between all three trading partners.*
- *The complexities and competitive nature of the North American marketplace required that the Commission make significant investments in export marketing, done largely through its participation in the USDA funded Market Promotion Program. . . . The Commission's involvement with FAS was at first on a stand-alone basis. However, USDA required that the Commission bring the Florida Tomato Committee into the program so that a united effort would be made in growing U.S. exports.*
- *The California Tomato Commission is one of the best performing participants in the USDA program, with an above average rating as compared to the all other programs.*
- *Since the opening of Japan to U.S. tomatoes, when \$153,000 of tomatoes were sold, the market has undergone a number of changes, resulting in a refinement of market strategy. The new strategies employed by the Commission in 2006, that of creating new menu items, was successful with sales increased by 55% to 2.6 million dollars.*
- *While the Commission has a number of retail and other promotions in Canada and Mexico, among the most successful events are trade missions and reverse trade missions that are open to all of industry. Most of industry has participating in these events over*

time, including but not limited to Gonzales Packing (Mexican Reverse Trade Mission: Sacramento/Rio City), and Central California Tomato Growers (Mexican Reverse Trade Mission: Fresno, Flemings; Trade Mission to Mexico).

- *The Quality Task Force, comprised of produce leaders from throughout North America, including representatives of Wal-Mart, the largest retailer in the U.S. for California tomatoes, the advisory committee played an important role in the development of food safety guidance for the industry.*

4. RESPONSE RE REPORTABLE FINDINGS

(i) Relationship Between Commission and Exchange

It appears that one of the CDFA Audit Office's primary concerns, based upon the report as a whole, is that the "Commission and the private 'agricultural cooperative,' the California Fresh Tomato Growers Exchange (Exchange) appeared to operate as identical in interest and organizationally on many occasions." (Report, p. 2) (*See also* Report, p.7: "the Commission and the Exchange appeared to operate like they had identical interests and in the same organization . . . The separateness of their identities became confused and merged.")

This proposition is fundamentally erroneous. The Commission and the Exchange served entirely different and distinct functions and operated separately and independently for all material purposes. The use of common staff and other resources was fully disclosed, arranged at arms length, and the subject of written MOU's. In any event, such use of common resources is not by itself improper and was never used as an instrument of concealment or wrongdoing.¹

¹ The auditors assert but do not support their alter ego conclusion. The principle of alter ego has been explained as follows:

There is no foundation for the CDFA's presumption that the Commission's and Exchange's identities were co-extensive or that their relationship was "unusual." (Report p. 7) (*Please see* discussion below regarding management of the Exchange for more detail.)

As reflected in the following chart prepared by Employee A, the functions of the two organizations do not overlap. Significantly, the Exchange was formed as a Capper Volstead Cooperative, but the Commission, of course, was not. For an explanation of the Capper Volstead antitrust exemption, please visit the USDA website <http://www.rurdev.usda.gov/rbs/pub/cir35.pdf>. A full explanation of the differences between the Commission and the Exchange is appended hereto as Exhibit B, along with accompanying documentation including MOU's and portions of the Exchange's operational policy.

Chart 1
Activities of the Respective Organizations

<u>Area</u>	<u>Exchange</u>	<u>Commission</u>
Research Program	None	Yes
Domestic marketing and promotion	None	Yes
Export marketing and promotion	None	Yes

The terminology "alter ego" or "piercing the corporate veil" refers to situations where there has been an abuse of corporate privilege, because of which the equitable owner of a corporation will be held liable for the actions of the corporation. The requirements for applying the "alter ego" principle are thus stated: It must be made to appear that the corporation is not only influenced and governed by that person [or other entity], but that there is such unity of interest and ownership that the individuality, or separateness, of such person and corporation has ceased, and the facts are such that an adherence to the fiction of separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice."

Roman Catholic Archbishop of San Francisco v. Sup. Ct. of Alameda Co. (1971) 15 Cal.App.3d 405, 411; internal citations and quotation marks omitted.

Governmental Affairs Program	None	Yes
Party to the Suspension Agreement With Mexico	Yes	No
Party to the Anti-dumping action With Canada	No	Yes
Historical Data Gathering on Volume	No	Yes
Forward Looking Volume Protections	Yes	No
Regulates Pricing	Yes	No
Volume Controls	Yes	No
Restriction on Producer Sales	Yes	No
Reporting of Actual Selling Prices to Members	Yes	No
Fines for violation of policy	Yes	No
Meetings of the Board	Yes	Yes
Primary means of meeting: Telephone	Yes	No
Assessments paid by Growers	Yes	Yes
Assessments paid by Handlers	No	Yes
Role of Ed Beckman	Advisor	CEO

Based upon the erroneous presumption that “the Exchange and the Commission operated as if their interests were identical and they were organizationally the same,” the CDFA concludes that “the Exchange did not, in fact, represent the interests of all assessment payers.” (Report, p. 7) Confusing the issue and misstating the facts, the CDFA states that there are “over 400” growers and 30 handlers who pay *Commission* assessments but that the *Exchange* “appears

to have been composed and led by 4-5 handlers and related growers who together produced, according to some estimates, 90% of the product for market.”

The Commission is unaware of any basis for the auditor’s statement. The proposition that a Capper Volstead Cooperative is “led by 4-5 handlers” reveals a fundamental misapprehension of the California Tomato Industry . Any review of Commission assessments would show that it is impossible for four or five handlers to control 90% of the product. Moreover, factually, there are fewer than 100 growers in the California fresh tomato industry, not 400, and all industry members were invited to join the Exchange. There is no support, and none is offered by CDFA, for the general assertion “[w]hile the Exchange represented the interests of only a portion of the industry, all of the industry paid for the activities that included those that supported the Exchange and the Exchange *appeared to have access to the information of all assessment payers.*” (Report, p. 7) Under the Capper Volstead exemption from Federal law and similar California exemptions for farmer cooperatives, the Exchange members were entitled to share information that could not be shared by Commission members because of restrictions protecting growers confidential information. [*Please see Exhibit B.*]

As noted above, all industry members were invited to join the Exchange. And, the Commission is not aware of any substantial evidence to support the auditors’ broad assertion that it “appeared” that Commission assessments generally funded Exchange activities. The few specific items of the Commission purportedly “funding” Exchange activities identified by the auditors are relatively minor and, moreover, such instances have been fully explained do not

support the auditors' broad assertions, and have been, or are in the process of being, remedied.

(Please see below.)

The following is a portion of additional information which was provided by Employee A to further explain the limited relationship between these two entities. The complete summary of the Exchange's purpose, functions, and operations may be found at Exhibit B.

The California Fresh Tomato Growers Exchange was formed by producers in response to declining profitability in the 1990s. The original founders, meaning, those who invested in the legal expenses, included most of the mature green producers, including Central California Tomato Growers. *Those producers viewed the formation of a Capper Volstead Cooperative, as had existed in Florida for many years, as the model for the new entity that would be tightly focused on pricing issues.*

It was never the intent that the Exchange would compete with the California Tomato Board or the Commission which would be established shortly thereafter. The intent was for the Exchange to provide services that are unique to cooperatives, thus complimenting whatever generic programs were undertaken for industry.

All industry members were invited to join the cooperative. Through the years, nearly all producers, except those aligned with Gonzales Packing, Sunrise Tomato (now defunct), Red Rooster, and Deardorff Jackson, have either been aligned with the start-up of the organization and/or served on the Board of Directors. All individuals who have served on the Exchange Board of Directors have at one time or another also served on the Board of Directors of the California Tomato Commission. This is due to the size of the industry being compact, with few small operations, and thus, there is an overlap of both companies and individuals.

The MOU between the Commission and Exchange was originally drafted by the Commission's legal counsel of Kahn Soares and Conway. *The MOU was drafted to be in compliance with the Department's Policy for Commissions; the specific guidance was and continues to be the management of Commissions by*

Associations, which, the Department's representative to the Commission Dennis Manderfield, repeatedly expressed would be acceptable to the Department as the basis for any MOU. It should be noted, the MOUs were always subject to Board approval in the presence of CDFA and Mr. Manderfield never objected to the MOU, nor the terms of the compensation to the Commission from the Exchange. Further, Mr. Beckman brought to the attention of the Department in April 2006 at the Commission's renewal hearing, the structure of the MOU, the input of the Department in the development of Commission policy related to the management of other organizations.

It should be noted, that formality of the relationship between the Exchange and Commission were fully disclosed at all meetings of the Commission where the subject arose; any liabilities of the Exchange to the Commission were disclosed to the Board and Department at meetings and in the submission of the audited financial statements. At no time did Mr. Manderfield express any concerns related to the liabilities or financial arrangements between the two organizations as presented during meetings of the Commission. Nor, did the Department object to the terms of the compensation, in that the budgets of the Commission were concurred by Marketing Branch Chief Lynn Morgan on an annual basis.

Hence, there is no "merging" of the Commission' and the Exchange in terms of the respective organizations' purposes or operations. They were formed for different reasons to accomplish different goals. Neither has there been any concealment of the relationship. On the contrary, the existence and terms of the relationship have been fully disclosed and effectively approved by the CDFA.

The Commission's independent auditor explains in a separate submission that the entities also were treated separately for financial statement purposes and observes that the auditors did not identify errors in that regard:

Relationship Between Commission and Exchange

As set forth in the Draft Audit Report (page 9), the Tomato Commission established an account in its general ledger that was used to track expenses incurred and paid on behalf of the Exchange. The Draft Audit Report notes that \$105,000 of the Exchange's expenses were paid by the Commission and that the Exchange subsequently reimbursed these amounts. Note 2 to the Tomato Commission's February 28, 2006 Financial Statements identifies a receivable to the Commission from the Exchange in the amount of \$5,020. Although the Draft Audit Report expresses a concern regarding the separateness and the independence of the Commission and the Exchange and the documentation of their relationship, it does not identify any substantial errors in the Commission's financial statement arising from their relationship.

As notes in the Draft Audit Report (page 12), two invoices (for website design and legal fees totaling less than \$12,000) were erroneously paid by the Commission for services rendered to the Exchange. As noted in the Draft Audit Report, the website charges were reversed and the Exchange reimbursed the Commission for the Exchange's portion of the costs. Unfortunately, the Draft Audit Report does not state the date of these invoices so it is not possible to determine whether these transactions were in any period audited by Mr. Carter.

Indeed, in the Executive Summary of the Audit Report, the CDFA highlights only two monetary items between the two entities: that the Commission paid \$48,000 to a website design firm of which \$5,585 was attributable to the Exchange's website. As the CDFA learned during audit, and the independent auditor above observed, an employee did not allocate that amount to the Exchange inadvertently due to the fact that the website design firm billed the total amount without a breakdown. As CDFA admits in the Report, the employee "acknowledged that an error had occurred and the Exchange reimbursed the Commission for this portion of the cost" (Report, p. 2)

The only other highlighted item in the Executive Summary concerning expenses is approximately \$6,800 in legal fees which “were invoiced to the Exchange but were paid for by the Commission.” Contrary to the CDFA’s presumption that the Commission’s payment of a portion of the Exchange’s legal fees was due to “internal control weaknesses” precluding staff from “differentiat[ing] between an expense of one company versus the other,” the Commission intentionally paid for a portion of the legal fees incurred by the Exchange in *California Fresh Tomato Growers Exchange v. Romas R Us, Inc., Maya Fresh, Inc.*, Fresno County Superior Court, No. 05 CE CG 00537, filed November 23, 2005.

The decision to allocate a portion of the *Maya Fresh* legal fees to the Commission was because the Commission received tangible benefits directly as a result of the litigation, including the Commission’s collection of assessments from Ricardo Meyer of Romas R Us. The litigation also produced public and industry benefits directly related to the Commission’s purpose and business which are difficult to quantify. These benefits include, for example, the cessation of certain gunnysacking activity, which was a subject of the suit, benefiting the industry in general and non-exchange members such as Gonzales Packing whose boxes were being used in particular. (*Please see* discussion of gunnysacking and surveillance below.) Moreover, the suit led to payment of assessments in connection with the State’s standardization and curly-top programs which further serves the public interest.

Notwithstanding the benefits to Commission and other state programs, the Commission has reviewed the legal fees incurred in the *Roma R Us* and *Maya Fresh* litigation and determined that the total fees paid by the Commission for the litigation amounted to at least

\$10,169.57 and also determined that there was an additional \$2,880.96 for other services invoiced to the Exchange. In light of the benefits to the Commission and its members, the Commission believes it was appropriate for Commission to pay these legal fees. However, to resolve the matter, and compromise the issue of who benefited from the litigation, the Commission has requested the Exchange to reimburse the Commission for \$10,000 in settlement of the issue and the Exchange has agreed to do so.

Concern is raised that Employee A managed both the Commission and the Exchange, and received compensation for doing both. However, the concern is vague, ambiguous and unsupported by evidence of wrongdoing or impropriety. As mentioned above, a detailed analysis of the purposes and functions of the Commission and Exchange is provided in Exhibit B and demonstrates that, for all material purposes, the entities were separate and independently managed.

In addition, the Commission requested and received a detailed explanation from Employee A regarding the relationship of these two entities and his role in each. This explanation is important and should be carefully considered:

The preliminary audit is incorrect in its assumptions and conclusions regarding Employee A's involvement with the California Fresh Tomato Growers Exchange. At the Commission, Employee A's role was that of CEO as provided for in the bylaws. At the Exchange, Employee A's role was primarily that of facilitating discussion among the members, ensuring compliance with all guidelines involving a producer cooperative established under the Capper-Volstead Act, and the auditing of compliance with Operational Policy, which governs the cooperative's membership. Thus, while Employee A's role at the Commission

was broad, the same cannot be said for Employee A's role at the Exchange, where the programs of the Exchange are narrow in scope and not in conflict with that of the Commission.

The California Fresh Tomato Growers Exchange was formed in compliance with the Capper-Volstead Act, providing anti-trust exemption to an association of producers, meaning, farmers who associate under an association, or associations that associate with other like associations.² There are a number of well-known Capper-Volstead Cooperatives, including Oceanspray Cranberries and the recently formed California Citrus Growers Associations. As noted by University of California researcher Shermain Hardesty, Capper-Volstead Cooperatives have had a long history in California agriculture.³ The requirements of a Capper-Volstead Cooperative are that the association must be operated for the mutual benefit of its members, and that the membership is limited to that of producers of agricultural products. Further, that the cooperative must not deal in the products of non-members in an amount greater in value than such products it handles for its members.

The California Fresh Tomato Growers Exchange was formed by a super-majority of the California fresh tomato industry and was based upon a successful and long-standing format used in the Florida industry, where multiple organizations are managed by the mandated program, in this case, Federal marketing order 966 operating under the authority of the U.S. Secretary of Agriculture.

Employee A's role is not unlike that of Mr. Reggie Brown, who is the Executive Director of the Florida Federal Marketing Order – Florida Tomato Committee; Executive Director of the Florida Tomato Exchange, a non-profit association; and manger of the Florida Tomato Growers Exchange, producers cooperative established under the provisions of Capper-Volstead Act for agricultural cooperatives. Mr. Brown, and his predecessor, Mr. Wayne Hawkins, has/have provided such services to the Florida fresh tomato industry without the objection of the United States Department of Food and Agriculture for more than thirty years.⁴ The concept in Florida was to provide complimentary not competitive programs utilizing both marketing order and association formats; the same concept holds true in California where the two organizations, the Commission and the Exchange,

² <http://www.rurdev.usda.gov/rbs/pub/cir35.pdf>

³ http://www.agecon.ucdavis.edu/outreach/update_articles/v8n3_4.pdf

⁴ Correspondence of Reginald L. Brown to Employee A, dated January 29, 2007., Exhibit C.

carry on their own programs, funded by their respective members, and decisions are made by their own independent board of directors.

Throughout Employee A's tenure as CEO of the Commission, he has maintained detailed discussions with the California Department of Food and Agriculture related to the relationship between the two organizations. These communications began with a request to CDFA's then appointed economist to the Commission, Glenn Yost on March 24, 1997, to review the proposed MOU between the two organizations.⁵

Such discussions were ongoing as the Memorandum of Understanding between the two groups evolved, and as Employee A's role changed. At no time did the Department express any concern related to Employee A's dual-role responsibility.

CDFA Commission Branch Policy, C107.1, in effect at the time of an email from Dennis Manderfield to Employee A dated August 24, 2005, detailed the Branch regulations governing the association of mandated and other organizations.⁶ As noted by Mr. Manderfield, while Branch policy was for associations that would manage a mandated program, the reverse situation would also be governed by the Branch policy. This discussion between Mr. Manderfield and Employee A was one of numerous discussions related to Employee A's dual role and what steps were to be taken to avoid any possible conflict of interest.

Policy C107.1 was adopted by the Branch given the fact that there are similar positions within other California agricultural-based industries, where Commissions provide managerial or other support services to or are allied with other mandated programs, including Pistachios, Avocados, and Tree Fruit. Further, Monfort Management Services, provides managerial services to a number of cooperatives, marketing orders, and commissions, and all within one office and therefore requiring that their staff wear multiple hats. There are a number of other mandated programs, including California Cherry Advisory Board, where the manager of the marketing order also serves as the manager of an association and/or research foundation. As a former employee of Monfort Management, Employee A was aware of how services to one commodity board or association were isolated from that of other boards for the purpose of billings and such knowledge was used to establish the protocol used at the Commission office.

⁵ March 24 correspondence Employee A to Glenn Yost, with attachments, Exhibit D.

⁶ Email from Dennis Manderfield to Employee A, dated August 24, 2005, Exhibit E.

Employee A's role with the Exchange was fully disclosed during Commission Board of Directors meetings in the presence of Dennis Manderfield, as noted in the minutes of the Commission since 2001. In addition, Employee A's role and compensation related to the Exchange was also reported on Employee A's Form 700 disclosures to the California Fair Political Practices Commission for the California Tomato Commission.

As Mr. Manderfield can attest to, when subject matter arose at a Commission meeting that was that of the Exchange or in any fashion related to the Exchange, Employee A promptly closed discussion, warning members that such matter was not appropriate for Commission meetings. As noted in the detailed analysis of the functions of the two organizations, each organization served a unique and separate purpose, and thus discussion and/or action related to a given issue was generally appropriate for one entity or the other, not both.

At no time, since the original MOU between the two entities was approved in 2001, has the Department raised any concerns at any meeting of the California Tomato Commission related to the relationship of the two entities or the dual managerial role. Nor has the Department in any other forum raised concerns or objections to the relationship between the two entities until the Cease and Desist Order was issued in September 2006.

As in Florida, the California fresh tomato industry is small in scope and most of industry participates in multiple organizations and is accepting of the dual role. In California, the dual management role had been supported by industry without any formal or otherwise objection from any industry member until 2005 – four years after such an arrangement first began.

In Employee A's dual role, he is subject to confidentiality agreements from the Commission and Exchange. The confidentiality agreement of the Commission is required of all employees and was first adopted by the California Tomato Board, the marketing order that preceded the Commission. *As Employee A noted at the time of the audit to Mr. Shakil Anwar, there have been two documents referencing Employee A's involvement with the Exchange. Mr. Anwar's statement in the preliminary report, that no such documents existed, was incorrect, and Anwar misrepresents Employee A's statements regarding the existence of such documents. As noted, there are two such documents - the first being certain Operational Policy documents that were proprietary*

to the Exchange and, second, Employee A's independent contractor agreement, which contains a confidentiality agreement. While Employee A was unable to provide a copy of the Operational Policy document at the time of the audit due to those documents being the property of the Exchange, Employee A did provide a copy of the independent contractor agreement. Mr. Anwar had access to the confidentiality agreement of the Commission, which was maintained in Employee A's personnel file.

As noted previously, Employee A's involvement with the Exchange is limited in scope, and was primarily that related to the gathering of member volume forecasting data and the distribution of this information for Monday morning conference calls of the producer membership of the Exchange and the distribution of the weekly FOB pricing report. It is not within Employee A's role to participate in the decision making process of the Exchange related to any activity contained in the Operational Policies; such decisions are made only by the producer members of the cooperative.

While Employee A was responsible for the auditing of Exchange members, this is the auditing of FOB sales invoices, not financial data. Any such audits could be conducted via the mailing of required documents, emailing of required documents, or on-site visits. Since 2005, the primary means of auditing has been other than on-site auditing, thus, nearly all Exchange business was conducted between the hours of 6:00 and 8:00 a.m. on Mondays (the date of the weekly conference call), or in the evenings or weekends. Thus, the limited scope of Employee A's responsibilities and the flexibility of providing these services outside of traditional business hours did not generate any conflict between Employee A's responsibilities to the Commission and those to the Exchange.

There are few instances where business of the Commission and business of the Exchange would intersect. For example, while the Commission funded governmental affairs, marketing and research efforts, the Exchange did not have such programs. This fact is documented by comparing the programs of the Commission as concurred by the Department of Food and Agriculture against the Operational Policies of the Exchange that are primarily limited to volume forecasting, restriction of certain grades, and reporting of FOB pricing, all programs that not found at the Commission.

Since Employee A's involvement in 2001, the only interaction of the two programs on given subject matter was related to the illegal packing of tomatoes, their sales being primarily through the 7th Street Produce Market in Los Angeles, and the need for increased surveillance with the goal of curtailing this illegal activity. Such practices were the subject of frequent discussion between the Commission and the Department. And, the Department of Food and Agriculture was clearly aware of the mutual concern of both entities, including litigation by the Exchange against certain individuals who were in violation of the State Standardization Regulations that applied to the marketing of fresh tomatoes through emails and personal discussions with Gary Manning, Dennis Manderfield, and Lynn Morgan, all employees of the Department.^{7 8 9} Further, the Department expressed support for the value of the surveillance program that was first initiated in 2005 subject to the memorandum of understanding between the two entities approved in the presence of Mr. Manderfield, and continued in 2006 through the Exchange.¹⁰ At no time did the Department, including the Marketing Branch or Standardization, express any concern to Employee A or the Commission's Board of Directors regarding the surveillance program or its funding mechanism. In fact, the Department of Food and Agriculture did not require a formal contract for services, only a Memorandum of Understanding for the programs undertaken in 2005 and 2006.

Contrary to the preliminary audit report, given the nature of the two programs being very different in scope, there were rarely opportunities for shared expenses. Where costs may have been common, the expenses were billed to the Exchange proportionately or in full.

For example, on an almost annual basis, Employee A would attend the Florida Tomato Conference. The Florida conference was structured similarly to the California Tomato Conference, with meetings of the various Florida-based organizations at the same site (Naples, Florida). For most of Employee A's attendance history Employee A's participation was limited to that of the Florida Tomato Committee – the Federal Marketing Order – that is in partnership with the California Tomato Commission in the USDA-Market Access Program. Thus, Employee A's attendance during this period of time was that of Commission business. However, when Employee A's participation was extended to that

⁷ Email to Dennis Manderfield, Gary Manning dated June 17, 200, Exhibit F.

⁸ Emails to/fr Lynn Manderfield, dated November 10, 2005; May 12, 2005, Exhibit G.

⁹ Email to Gary Manning, dated July 8 and July 21, 2004, Exhibit H.

¹⁰ Email from Kevin Masuhara, dated December 1, 2006, Exhibit I.

of a visitor during meetings of the Florida Tomato Growers Exchange or Florida Tomato Exchange, Employee A billed the attendance at the Conference to that of the California Fresh Tomato Growers Exchange, to eliminate any concerns related to Employee A's costs related to attending the Florida conference and the meetings of the respective Florida cooperative and association.¹¹

In the Gonzales complaint and elsewhere, and alluded to in the preliminary audit report, allegations have been made of Employee A's providing CTC generated "pack out" reports or other proprietary information to the Exchange raising questions of possible conflict of interest. These allegations are without merit. The "pack out" report is generated by shippers directly through their own password protected access to the Commission's website, with these reports being made available to all members in summary format at approximately 12 noon, Monday to Friday. Gonzales Packing has refused to provide such data since 2004. Employee A has not provided any proprietary data of one shipper to any other member or the Exchange and does not have access to such proprietary "pack out" data. Further, the data is historical in nature; the Exchange, unlike the Commission, only deals with forward-looking volume forecasting as detailed in their Operational Policies. Thus, such historical "pack out" data is of no value to the Exchange.

As of December 31, 2006, Employee A's contract with the California Fresh Tomato Growers Exchange has terminated. The contract will not be renewed. The Exchange is discontinuing operations.

Exchange Surveillance Contracts with the CTC

There appears to be confusion in the Audit Report regarding the Memoranda of Understanding between the Commission and Exchange. The Commission and Exchange entered into general Memoranda of Understandings concerning the nature and terms of their relationship.

¹¹ GL of the California Tomato Commission; credit card records of Employee, previously provided and (available at the office of the Commission).

However, in addition, the Commission and Exchange entered into a separate Memorandum of Understanding in connection with surveillance activities. It is worth understanding the surveillance issue and the subject contracts in some detail because the auditors' gloss appears to be just that—superficial in nature.

The following explanation was provided by Employee A:

The Exchange considered the feasibility of funding for surveillance operations related to gunnysacking when it became apparent that no short-term solution was available from the Commission.

The Commission's action plan, including AB 649, would delay the implementation of food safety initiatives, which they (Exchange) viewed in conflict with the directive of FDA issued in February 2004.

Industry believed that tightening Article 43 would not be sufficient, that additional enforcement would be required. Thus, the Exchange decided that they would assess their members to provide the means to increase manpower by the State and selected counties, related to the enforcement of Article 43. The Exchange made this decision shortly after the CTC voted its support of the amended Article 43.

The Exchange members voted to support a supplemental assessment against all members based upon prior year production. The supplemental assessment raised \$158,429.67 that would enable funding of activities at the State and county levels that would support the enforcement of the California Ag Code specific to Standardization and the regulations governing the production and marketing of fresh tomatoes within California. These funds were accounted for separately from regular assessments and would be provided to the Commission as required to satisfy the MOU between the two entities.

The contracts established by the CTC for the Exchange per the MOU provided a cap on expenses; actual performance varied significantly from county to county.

The Exchange funds received from its members also supported the funds of an answering service that was used by any individual, in

or outside of the Exchange, who wished to report gunnysacking activity or any related activity that was in violation of the California code as it applied to fresh tomatoes.

Historically, the Exchange had previously entered into contracts with various counties in the 1990s. The Exchange, however, does not have the infrastructure as it did at that time, when the CTC provided manpower to the Exchange; thus, the Exchange sought an MOU with the CTC to contract with the counties and retain an answering service to relay complaints of illegal operations to the respective counties.

The Commission, at its May 18, 2005, meeting, attended by CDFA's Dennis Manderfield, approved an MOU with the Exchange to provide such services. At no time following the meeting did CDFA ever express any concern with the MOU. The MOU to provide services was signed by the Commission president and Chairman of the Exchange.

Contracts were established by the Commission with the respective counties and/or CDFA. The liability for the contract amount was that of the Exchange under the MOU. Counties and/or the State were aware of the joint funding mechanism through verbal communications.

Concurrently, the Exchange litigation moved forward against the gunnysackers, with one gunnysacker, Ricardo Mayer, of RomasRUs, who later agreed to an out-of-court settlement that included the paying of back assessments to the Commission. RomasRUs has since paid their assessments to the CTC.

The gunnysacker in question had been cooperative in detailing the scope of the illegal activity in the Los Angeles market, which we relayed to CDFA. We estimate that the revenue loss to the CTC from such activity in the amount of \$1,600 per day (25 loads x 1,600 boxes x .04 per carton).

Concurrently, the CTC moved forward with the amending of Article re; delays were frequent at CDFA due to concerns related to the regulations required and specific language, including trace back provisions, the role of the Office of Administrative Law, and issues related to the proposed MOU.

Amendments to Article 43 were subject to a public hearing in Salinas, California, on June 23, 2005; at this meeting, a number of

allegations were made by Gonzales Packing that were refuted by a number of industry members.

The Governor vetoed AB 649 at the end of the legislative session, thus curtailing hopes of industry to move inspection and GAP authority to the CTC effective 2006.

At the December 13 meeting of the Exchange, the general MOU with the Commission was terminated; this includes the termination of the MOU for surveillance activities.

At the conclusion of the program, the Exchange made three payments to the Commission in the amount of \$69,639.38 in fulfillment of the MOU. Two payments were made directly to the counties, as the MOU between the Exchange and Commission had been terminated as of December 31, 2005. Those payments were to Los Angeles and Fresno Counties, in the amounts of \$2,070.00 and \$16,353.97, respectively.

The remaining unspent funds were retained by the Exchange and provided the basis for 2006 funding of surveillance activities that are governed by an MOU between CDFA and the Exchange that was entered into in August 1006 by Rick Jensen on behalf of CDFA and Ed Beckman on behalf of the Exchange.

As is evident, the situation regarding surveillance, contracts and the interaction between the Commission, Exchange, CDFA, and various county governments was transparent, justifiable and did not implicate any misuse of Commission assessments.

Relationship Between Commission and the Foundation

The contemplated purpose of the California Tomato Research Foundation was to pursue proprietary research technology for the industry, distinguished from research provided at public universities which is publicly available. The Board of Directors approved the formation of the Foundation in open session in the presence of CDFA representative Dennis Manderfield.

The CDFA concurred with the 2006 budget, which included funding for the Foundation. No one posed any potential conflict of interest in, or otherwise objected to, the Commission's pursuit of proprietary research through the Foundation.

However, as it turned out, the Foundation never got off the ground. The Bylaws remain in draft form, and the entity remains stalled in the formation stage. There are few records, but for the draft bylaws previously provided, and no transactions beyond the Commission's preliminary exploration actually have taken place.

The Commission is aware of no evidence that Employee A "managed" the Foundation or that the Commission separately compensated Employee A in connection with the Foundation. See California Tomato Commission website for its purpose and contact/management of the Foundation. Neither is the Commission aware of Employee A otherwise receiving compensation related to the Foundation. Employee A has confirmed that he did not have managerial responsibilities at the Foundation nor did he receive compensation from the Foundation. Employee A further explains:

California Fresh Tomato Research Foundation

The California Fresh Tomato Research Foundation was proposed by Kahn Soares and Conway, the legal counsel of the California Tomato Commission, as a means to generate funds from other than assessments to support the research needs of the industry. The concept was based upon that being used in other industries – including the California avocado industry.

At no time has Employee A been formally associated with the organization or received any type of compensation or been promised any compensation for any services provided. To the best

of Employee A's knowledge, the Foundation never became fully operational.

Employee A's responsibilities were limited to that of interaction between the Commission and its legal counsel on issues related to creation of the Foundation and to identify fund raising mechanisms for the support of the Commission's research program. Such roles are within the parameters of Employee A's being CEO for the California Tomato Commission.

The principal concern raised in the Audit Report is that Employee A took a trip to Sicily, Italy, in connection with the Foundation to attend a world tomato conference (the 2005 Syngenta Tomato Conference) and that the Commission allegedly paid for it without reimbursement. The Commission's understanding is as follows. The 2005 Syngenta Tomato Conference was an invitation-only event. Based upon the explanation of Employee A, a member of the California Tomato Commission's Quality Task Force, Mr. Rod Jorgenson (Tomato Product Manager, Syngenta Seeds Company/Rogers Brand) invited Employee A to attend.¹²

The Commission was reimbursed for full fare coach airfare to and from Catania, Italy (see invoices to Syngenta for Employee A's airfare and the General Ledger and AR reports for payment by Syngenta to the Commission). In accordance with Commission policy, the Commission paid the difference between full far coach and business class. All hotel and meal expenses were paid for by Syngenta or Employee A with one exception. Due to an air traffic

¹² The Audit Report mentions that Foundation donors would receive a tax benefit and that royalties from Foundation projects would flow through the Foundation to fund other projects. This arrangement is similar to one in Florida. One such project which was discussed early on concerned the feasibility of proprietary breeding with a large seed company (Company E), with a share of industry purchases from Company E to be returned to the Foundation to support generic breeding at UC Davis. The trip to Italy was in connection with the contemplated project.

controllers' strike, Employee A had to remain in Italy an additional night,¹³ and those expenses were paid by the Commission. Please see Exhibit J.

Accordingly, the Commission funded the initial exploration of a Foundation, legal fees for draft bylaws, and a diminimis portion of Employee A's participation in the 2005 Syngenta Tomato Conference. The Commission has determined that it would be diseconomic and impractical to attempt to retrieve these small amounts, which amounts were justified in any event as consistent with its mandate to promote the California fresh tomato industry and a reasonable effort to further improve the industry.

Commission Conferences

The CDFA criticizes in principle the Commission's annual conferences. As demonstrated in detail below, the conferences served an important public service under the mandates of the statute and produced substantial public benefits. The majority of expenses related to the conferences were underwritten by third parties, and were not disputed by the CDFA auditors. Thus, the Commission's expenses were substantially leveraged by sponsorships thereby producing maximum benefits at minimal cost to the tomato industry and its growers and consumers. These public benefits are wholly ignored by the auditors in their unsupported conclusion that "we do not believe [conference expenses] to be in the best interest of the public." (Report, p. 3) Employee A has provided an overview of the conference purposes:

¹³ According to Employee A, the flight schedule was from Cantania to Rome to Munich to San Francisco. The strike resulted in a cancellation of all flights and the best, if not only, alternative was to spend the night in Rome and arrange for a flight to the U.S. the next day.

The conference is used to increase industry awareness and usage of Commission programs, to create awareness of emerging trends, and enable staff to finalize programs. The event is considered part of an overall marketing effort related to issues that financially impact its members not unlike other organizations and companies who consider the return on investment from such activities to be positive for the industry in general.

The issues addressed at the Conference are not available through other means, including Western Growers or other trade associations, as the focus at these venues is not "tomato specific." Over the years, the keynote speakers included: Bill Lyons, Secretary of the California Department of Food and Agriculture; Gus Schumacher, Undersecretary for Farm and Foreign Policy, USDA; Bruce Peterson, Vice President of Produce - Wal-Mart Stores; and, the conference has been well attended by representatives of government, including USDA-AMS, USDA-FAS, Ag Canada, Sagarpa (Mexico), (Cabo San Lucas 2004).

In addition, the following information was narrated by Employee C, an active participant on behalf of the Commission at Conferences:

Beginning in 2002, the Commission began a series of interactive educational programs for industry. During the 2002 conference, "What the Retailer is Looking For," consisted of a panel of top retailers from the U.S. and Canada, as well as an expert on consumer trends. This staff-moderated, interactive panel gave insight as to what the grower/shipper should do to stand out in the crowd of the tomato category and the produce section, as well as what fresh tomato quality areas needed to be improved upon for the retailer as well as the consumer. Panelists included Michael Mockler, Thriftway in Canada, Steven Junquero, Save Mart Supermarkets, California, Steve Lutz, The Perishables Group, Wanatchee, Washington.

In 2003, this series continued with a hands-on workshop of foodservice personnel from throughout the U.S. on what that sector is looking for in quality, pricing, and packaging. The workshop, "I'll Have What She's Having," was an in-depth look at how foodservice buyers and their repack suppliers are changing needs

and specifications for their restaurant customers. Panelists included Maurice Totty, Applebees; Greg Reinauer, Amerifresh; Bill Piper, Grant County Foods. This panel and presentation was also coordinated and moderated by staff.

The third workshop in the series, in 2004, was aimed at the sales arm of the grower/shipper equation: "New Dynamics of Buying and Selling," moderated by Ronnie De La Cruz of the Produce Marketing Association. This presentation was entirely coordinated by Employee C. Also, Employee C gave a presentation to industry during the General Session on domestic tomato movement and marketing trends for the 2003 season, and participated in the industry roundtable, "Growing Your Share of the Mexican Retail Market," with the Mexican trade. (Note: These materials were given to CDFA audit staff.)

As the issue of food safety grew, so did the Commission's commitment to keeping industry updated on buyer demands and concerns related to food safety, and moving forward to meet those demands. To that end, the conference programs were aimed specifically toward food safety issues for the 2005 and 2006 programs.

In 2005, Employee C coordinated and moderated a panel of food safety experts, including retail, foodservice, repacker and trade associations, as well as produced a comprehensive video outlining past tomato food borne outbreaks for the session. Employee C also gave a presentation on crisis management mistakes from past high-profile outbreaks, including Taco Bell and Chi Chi's Restaurants. The session's title was "Food Safety: Whose Responsibility is it?" Panel participants included Wal Mart, Darden Restaurants, united Fresno Fruit and Vegetable Association, Andrew and Williamson, Del Monte Fresh, and the Alliance for Food and Farming. (Note: These materials were given to CDFA audit staff.)

Continuing on the issue of food safety and successfully selling fruit into the foodservice sector, the Commission presented "Changing Trends in Foodservice Purchasing" in 2006, also solely organized, coordinated and moderated by Employee C. Panel participants included Yum! Brands (Taco Bell, KFC, Pizza Hut), Darden Restaurants (Olive Garden, Red Lobster), and Subway.

Employee C then presented at the State of the Industry seminar on current consumer trends within the tomato category, and a five year reflection on buying patterns. (Note: These materials were given to CDFA audit staff. A second copy is attached.)

See Exhibit K.

Unquestionably, the conference produced numerous benefits in education and promotion activities intended to enhance the California fresh tomato industry, consistent with the Commission's statutory purpose and mandate to educate, promote and advertise. Considering that the Commission paid for only a fraction of the costs of these conferences because of the sponsorships, the industry and public benefits far outweigh the Commission's costs. The auditors focus only what they call conference "losses," which they overstate in any case. (*See below*). But this misses the point. The amount characterized by the auditors as "Loss" more accurately represents only a small investment by the Commission which, when highly leveraged by the donations or sponsorships of underwriters, produces substantial public benefits.

The CDFA auditors expressed concern that expenses at the conference were not properly allocated and suggest that the information reported by the Commission is consequently misleading. On its face, this proposition is not correct since specific expenses directly related to Commission Board meetings and Exchange Board meetings taking place at the time of some of the conferences were separately and clearly allocated and disclosed, to accurately represent each activity.

As set forth by the independent auditor who audits the Commission's financial statements, the CDFA auditors are not correct regarding the reporting of Conference-related revenues and expenses:

The Draft Audit Report criticizes the Commission for not providing "clear transparency or disclosure of all conference related activity to all assessment payers of the CDFA." Specifically, the Draft Audit Report (pages 18-19) criticizes the Tomato Commission's financial statements for netting conference revenues against expenses and reporting the net amount on the financial statements and annual budgets. The Draft Audit Report substitutes the CDFA's auditor's judgment and recommends that "the Commission should ensure that all conference related income and expenses are fully disclosed at gross in the annual budget submitted to the CDFA for concurrence and the financial statements sent to all assessment payers."

Although the Draft Audit Report would reallocate some conference expenses from conference to travel or vice versa, there is no dispute that all expenses were recorded in the Tomato Commission's books and records. Apparently the Draft Audit Report and the Summary of Conference Receipts and Disbursements (page 15) was prepared from the Tomato Commission's books and records.

With regard to the decision to "net" conference receipts and expenses, it is important to note that this is not a revenue-producing activity for the Tomato Commission. During the CDFA audit, Mr. Carter explained the accounting treatment in a September 27, 2006, letter to Mr. Shackelford. Revenue and expenses are from an entity's major, ongoing operation. In the Tomato Commission's case, revenue would be from assessments and market access program grants. The Tomato Commission's major, ongoing operation is not hosting the annual conference. Indeed, the annual conference is not expected to make a profit, merely to break even. Accordingly, under Statement of Financial Accounting Concepts 6, the conferences were reported net, not gross. This was done, correct, in the financial statements. To show the conference at gross amounts would lead a reader to believe that the revenue from this activity is a "major, ongoing operation" of the Tomato Commission. It is not and, under accounting theory, should be reported at gross amounts.

Furthermore, the total amount involved is less than 3% of gross revenue and the deficits incurred for each of the annual conferences are (according to the CDFA's Draft Audit Report) less than 1% of the gross revenues. Finally, because all assessment payers were notified of the existence of these conferences and had the opportunity to participate, the Tomato Commission's judgment

to not report the gross amounts of revenue and expenses for annual conference does not decrease transparency or accountability and I is not misleading.

With regard to the allocation of conference expenses between "staff and board travel" and "conference expenses," this is a judgment by the Tomato Commission and its accounting staff. Although the CDFA's Draft Audit Report would reallocate approximately \$6,700 from Commissioner and Administrative Travel to the conference expenses, this is an immaterial amount when compared to the Tomato Commission's total revenue or its total expenses. Most importantly, the net amount was properly recorded as an expense item.

The auditors also question the Commission's long-standing practice of allowing some family members of staff to accompany them to conference-related events. As discussed in the following section regarding credit card charge changes, "personal" or family-related conference travel for the entire three-year audit period, is approximately \$28,000.

It is appropriate here to note that the Commission requested and received the following explanation from Employee A regarding personal or family conference-related expenses:

On the issue of family travel, it is manifest that no improprieties occurred with respect to Employee A. It has long been CTC practice and policy that family travel expenses were covered as part of the California Tomato Conference and indeed all of Employee A's expenses in this regard were fully disclosed to and approved by the CTC Board.

Further, the expenses were wholly justified under the particular circumstances in question. By way of background, the California Tomato Conference has been in existence since 1986. Annual attendance at the conference has ranged from approximately 100 to nearly 300 individuals. The attendees are not limited to tomato producers or members of the Commission. The event is open to all interested parties and serves as a means to further advance

programs of the Commission and to address issues that may economically impact the industry.

The conference was typically organized by staff with little, if any, outside help. Given the small size of the Fresno staff, no more than five individuals, it had been customary practice to enlist the help of family members to assist in the preparation of meeting packets distributed to all attendees and to help with on-site coordination. There were times during the conference, that the multitude of events simply demanded additional support and that support was from the attending family members.

It has long been practice and policy, that family members were invited to attend the conference and such charges would be billed back against the conference. This is largely in exchange for the work prior to, during, and post conference. In Employee A Beckman's situation, his son helped with the set-up of the golf tournaments, helped to assemble registration packets, monitored the hospitality suite, and ran errands for the staff. His daughter provided babysitting services, monitored the hospitality suite, and ran errands for staff. At some conferences, his wife served as a tour host on spouse functions.

The Conference, could have as an alternative, hired additional on-site staff from destination management companies. The Commission could have also contracted out the preparation of conference materials. However, those are viewed as expensive options and are not in keeping with the past practices of the Conference, as it was first established.

At no time in the existence of the Conference, had Employee A been advised by the Department of Food and Agriculture that such practices may represent a gift of public funds. As the family members in question provided valuable services that otherwise would have required payment to outside vendors, their attendance does not represent a gift. Finally, it should be noted that the 2006 conference recorded a profit. Thus, there was no use of public funds in support of the conference, and therefore, any repayment by staff would represent additional profit, not a repayment of CTC funds.

In short, the amount of Commission funds used to pay for family-related travel in connection with the conferences is less than \$30,000 over a three-year period. The conferences

produced substantial benefits and the family members often provided services for which the Commission otherwise would have had to pay third parties. The conferences provided excellent opportunities for networking for which the family-friendly environment was beneficial. Together with the substantial industry benefits produced by the conferences described above, even these “personal” costs are justified. The Commission was aware that similar programs existed in other industries and had no reason to believe them improper in any way. None of these factors appear to have been taken into consideration by the auditors in leveling a blanket disapproval of these important programs.

Credit Card Charges

The auditors found that the Commission did not keep adequate documentation for credit card charges because it did not keep individual invoices, receipts, and hotel folios, for example. While the CDFA auditors referenced credit card company statements, it should be noted that such statements are detailed in identifying and summarizing the charges. It is also significant that the Commission was advised by its independent auditor that the credit card statements were adequate for record-keeping purposes. Nevertheless, the implication which arises from the Report’s reference to total credit card charges of “approximately \$653,000” during the audit period is that the entire amount is suspect. That simply is not the case. Even without individual receipts, the credit card statements, along with the staff’s explanations, show that the vast amount of the credit card charges were for Tomato Commission business purposes and were reasonable. Many of the staff’s explanations were supported by documentation other than invoices and receipts, such as documentation of the events or activities pursuant to which

the charges were incurred. And, as noted by the CDFA auditors, many invoices were retrieved from third-party vendors to the extent practicable. While the Commission's practices may have been less than ideal, there still is substantial support for the charges and no basis for assuming impropriety.

Please note that the employees continued to receive back-up for credit card charges after the close of the audit investigation period. To avoid confusion, that additional back-up is not enclosed here but is available upon request.

It is worth noting that the liability on the American Express accounts was Employee A's personally, not the Commissions. Employee A confirmed this by inquiring of American Express "[w]ho has the liability of this amount—is it the Commission or myself personally?" American Express responded "[p]lease know that the liability on this account is yours personally." Please see Exhibit L.

Moreover, of the total \$653,000 in credit card charges over the three-year period, the Commission's employees have determined that a total of less than \$28,000 is attributable to personal or family expenses, primarily in connection with conference-related travel. The identification and calculation of these personal or family expenses and the substantial justification for the remaining expenses show that the Commission's expenditures were proper. This is a prime example of the Auditors referring to a total, \$653,000, when only a fraction of that amount ultimately is in issue.

The Commission requested and received information from each of the four employees in question as to a breakdown of family or other personal credit card charges incurred in connection with the conferences and pre-site visits.

The total for Employee A is \$6,840.78. (See Exhibit M.) Employee A has offered as follows and the Commission has determined to accept the offer:

Notwithstanding the foregoing, in light of the CDFA's recently announced stance that the family expenses allegedly represent a "gift of public funds," Employee A has agreed to repay the amounts in question out of his own pocket. This action is being taken as a gesture of good faith in order to settle and resolve any controversy on this issue and should not be interpreted as an admission of responsibility or culpability on the part of Employee A, which responsibility or culpability is expressly denied.

Employees B, C, and D reported family or other personal expenses related to conferences in the respective amounts of \$6,032.70, \$1,330.85, and \$2,734.29. Please see Exhibits N, O, and P. These employees have stated their position that they were acting under express Commission authority, and within the scope and course of their employment, and that they would defend against any action brought against them by the Commission for reimbursement. In addition, these employees each have reported that their respective spouses and significant others performed services for the Commission at the conferences, a fact confirmed by the former CEO and several Board members. Also, the employees indicated that they worked substantial overtime at the conferences that was not compensated.

Because the amount at issue for these three employees is \$10,097.84, the Commission concluded that the cost of legal action to collect from these employees would

exceed the reimbursement amount, and there always is some risk that the employees may prevail and/or assert offsets for services rendered by family members and/or for their overtime. In light of the cost-benefit analysis, the Commission does not believe its best interests are served by proceeding against these employees.

Use of Private Aircraft Charters

The Commission agrees to perform cost-benefit analyses when comparing commercial airfares to use of private aircraft, as it has done in the past. Of the 13 charters identified by the auditors, three were funded by USDA-MAP funds. MAP does require a cost analyses that illustrates the cost savings as compared to commercial airfare. One charter (number 9), for example, transported funded researchers to a tomato production region that is 175 miles from the nearest airport. It is perhaps more readily apparent that private aircraft is more cost-effective when passengers, such as attorneys, are billing by the hour as was the case in two of the identified trips. However, even in those instances where passengers, such as Board or industry members, were not billing an hourly rate, their time away from their businesses is a significant factor, when considering the additional time and inconvenience of commercial airline scheduling.

Employee Receivables

The Report indicates that Commission employees charged personal expenses to their American Express cards in violation of internal policy. However, the Report also indicates that the Commission provided the CDFA auditor with its General Ledgers back to 1999 clearly showing such charges and demonstrating the transparency of the practice. The auditors

determined that “[t]hese personal charges were not further explored by our office since the Commission established an Accounts Receivable for each of the employees which were eventually paid off by them.” Report, p. 24.

Under the circumstances, the Commission agrees to the recommendations to disallow staff making personal charges to Commission credit cards and to strengthen applicable internal controls, while underscoring that it is aware of no attempt to conceal the personal charges or to not repay them, as the General Ledgers and actual repayment evidence.

Sponsorships

The Commission is alleged to have paid \$45,000 to Individual A for advertising on a race truck and that Board Member A was “a co-driver.” The referenced race truck was an expenditure approved in connection with MAP, and paid for with MAP matching funds. MAP’s approval of the expenditure is fully documented and the most recent MAP audit resulted in no reportable findings.

The promotion of California fresh tomatoes at well-attended racing events is consistent with the Commission’s statutory purpose. The liaison for the Commission with the Market Access Program is Bryant Christie Inc. Its representative Ms. Amy Thompson has explained as follows:

I am writing to provide more information about the eligibility of the Baja advertising activity.

Advertising is generally allowed under the Market Access Program (MAP). However, because this was a new activity, I still contacted Elizabeth Mello at the Foreign Agricultural Service (FAS) to obtain her approval prior to CTC moving ahead with the Baja advertising opportunity. Ms. Mello was our Marketing Specialist at that time. To explain, Marketing Specialists are the first points of contact for cooperator groups such as the California Tomato Commission, and all questions regarding Market Access Program (MAP) eligibility and rules are directed here. While marketing specialists may seek guidance from others in the agency, communication on all matters comes back directly from them. Ms. Mello approved the advertising for Baja through an email communication. A copy of this electronic correspondence is attached.

The Baja advertising activity was later audited as part of the California Tomato Commission's MAP audit in September 2005 by FAS Compliance Review Staff. This 2005 audit was a comprehensive audit that included review of each invoice and related documentation from 2002 through August 2005. At that time, Compliance Review auditors determined that this activity was in full compliance with MAP regulations. I have attached the complete letter from Compliance Review Staff that outlines other detailed findings but makes no reference to the Baja advertising activity.

Given the pre-approval of the activity and subsequent confirmation through the MAP audit, it can be concluded that this was an eligible activity. If you should require any further clarification, please do not hesitate to contact me.

Please see separate submission of Board Member A.

In addition, as set forth in the Declarations of Board Member A and Individual 1, Board Member A does not now have, nor has he ever had, a financial interest in the race truck or company which owns it. *Please see* Board Member A's separate submission.

Total Salary Paid to Employee A

The Commission has consulted the 2005 Salary Summary for Chief Executives of California Marketing Programs, based on salary information collected by the CDFA. The 2005 Salary Summary shows that the compensation paid by the Commission to Employee A is well within the range of salaries surveyed. Even if compensation from other sources is taken into consideration, the total compensation to Employee A remains within a reasonable range. However, it is outside the scope of the Commission's responsibility to determine the appropriateness of compensation derived from independent sources. In any event, Employee A also has provided estimated overtime and out-of-pocket expenses for which he did not seek reimbursement or compensation. *Please see Exhibit Q.*

Payment of Unsupported Accrued Vacation Hours

The Commission acknowledges some confusion in the documentation of its Employee policies and agrees to improve its internal controls in this regard. However, it has been the Commission's routine practice to permit employees to cash out accrued vacation time and, to the extent it was necessary for them to do so, the Commission's Board has effectively approved the employees' receipt of this benefit and determined not to seek reimbursement. Each of the subject employees has advised the Commission that they would defend against any action brought by the Commission to retrieve any or all of the payments to them. (For the audit period: Employee A--\$19,375; Employee B--\$1,138; Employee C--\$8,750; Employee D--\$916) further supporting the Commission's decision not to seek reimbursement. Please see Exhibit R for the employees' analyses of their accrued vacation time during the audit report.

The Commission's independent auditor observes:

The Draft Audit Report notes that . . . , one version of the Tomato Commission's Employee Handbook prohibits the payment for accrued but unusual vacation time. As noted in the Draft Audit Report, another version of the Employee Handbook does not prohibit these payments.

As part of his audit procedure, Mr. Carter asked each of the four employees (The total number of persons employed by the Tomato Commission) whether they had accrued vacation time as of February 28, 2006. In addition, Mr. Carter requested the employees' W-2's for wages and vacation pay on an annual basis. Each employee stated that as of February 28, 2006, they had no accrued vacation. As noted above, an auditor may rely on his "observations" or "inquiries" as the competent evidentiary basis for his opinion about the financial statements under audit.

Violation of Open Meeting Laws

The CDFA questions whether a dinner involving some Board members and others qualified as a Board meeting subject to notice and open meeting requirements. To the best of the Commission's knowledge after inquiry, the auditors obtained information from a Commission staff employee who did not attend the dinner to the effect that "Board business" was discussed. After consulting with other employees and Board members who did attend the dinner, it appears that the dinner was to network and strengthen relationships, a reasonable business purpose, and there were only general comments made about the future of the California fresh tomato industry during the evening. Nonetheless, as a gesture of good faith, the current chairman of the Board has offered to reimburse the Commission for the wine at the dinner and the Commission has accepted his offer to do so.

Violation of the Public Contracts Code

The auditors identify several of the Commission's contracts with third parties, suggesting that they should have the subject of competitive bidding. There is, in the first instance, a real question as to whether such requirements apply to the Commission.¹⁴ But,

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The CDFA auditors here seem to assume an obligation on the part of the Commission as a public entity to comply with the Public Contract Code. To the contrary, in *San Diego Service Authority for Freeway Emergencies [SAFE] v. Sup. Ct. of San Diego Co.* (1988) 198 Cal.App.3d 1466, the Court of Appeal explicated the necessary legislative mandate for application of such a rule – a mandate here plainly lacking:

Notwithstanding the powerful purposes served by competitive bidding, there is no all-pervasive public policy that requires all public entities to engage in that practice. Rather, the Legislature imposes competitive bidding requirements on public entities within its purview when the Legislature determines it is in the public interest to do so. *Id.*, at p. 1469.

In *San Diego, supra*, the Court of Appeal characterized the sole issue as "whether San Diego SAFE is required to apply competitive bidding principles," and then opined that "to prevail [the party arguing competitive bidding is required] must establish a legislative restraint on [the entity's] ability to contract. The statutory scheme providing for the establishment of service authorities . . . does not contain a specific statutory requirement that service authorities engage in competitive bidding in awarding contracts." (*Id.*, at p. 1469.) Nor, the court held, could such restriction be implied:

The enabling legislation does not set forth any limitations on a service authority's ability to contract. We must presume that if the Legislature had wanted to require competitive bidding in all instances it would have done so specifically. [Respondent] has failed to cite any example where the Legislature imposed a competitive bidding requirement by other than a specific statutory provision. *Id.*, at p. 1472.

A similar conclusion is inescapable in the present case. Food & Agriculture Code, section 78652 provides:

The commission shall be, and is hereby declared and created, a corporate body. It shall have the power to sue and be sued, *to contract and be contracted with*, and to have all and possess all the powers of a corporation. *Italics added.*

Here also, then, the enabling legislation does not set forth any limitation on the Commission's ability to contract, nor under *San Diego* can such limitation be implied.

Article 3 of the State Contract Act, mandating competitive bidding, provides that it shall apply to any "state agency." (Pub. Contract Code, § 10335, subd. (a).) "State agency" is therein defined as follows:

"State agency" as used in this article, means every state office, department, division, bureau, board, or commission, but does not include the Legislature, the courts, or any agency in the judicial branch of government. Pub. Contract Code, §10335.7.

First, labeling by the Legislature as a "commission" is simply *not* dispositive legally. In determining whether or not an entity was an agent of the state, courts of appeal have held that the determinative factor "is the relationship between the entity and the state, not the label attached to the entity...." (*Lynch v. San*

moreover, most if not all of the contracts identified by the auditors were competitively bid by virtue of their relationships to the Market Access Program. Bryant Christie representative Amy Thompson, by letter dated January 10, 2007, writes “to provide evidence of competitive bidding practices undertaken by the California Tomato Commission.” See Exhibit S commencing at Bates-stamp number BC00030, which also includes additional information regarding MAP-funded activities of the Commission. Moreover, the auditors’ analysis of amounts paid on the contracts is inaccurate and misleading in that the total amounts represent totals for more than one year. In addition, it is common practice, consistent with governing law, that requirements of competitive bidding are relaxed as to professional engagements, such as attorneys with particular expertise. In sum, even if competitive bidding practices were required, the Commission is in

San Francisco Housing Authority (1997) 55 Cal.App.4th 527, 536.) Moreover, California courts have further held that an entity may be a state agency for one purpose but not for other purposes. (*Id.*, at p. 535.)

As noted above, no case appears to be directly on point as to whether the Commission is a state agency. However, the analysis courts have used in determining whether an entity was a state agency – and thus subject to sovereign immunity under the Eleventh Amendment – is instructive here, since both competitive bidding requirements and the Eleventh Amendment serve similar purposes: protection of the public fisc.

In *Lynch v. San Francisco Housing Authority*, *supra*, 55 Cal.App.4th 527, the court considered the most significant aspect of the Eleventh Amendment analysis to be the vulnerability of the state’s purse; i.e., if the state is liable for debts or judgments against an entity, then it is more likely to be considered a state agency. (*Id.*, at p. 539.) There, the court concluded that “[t]hus, the statutes do not establish as a matter of law that the state must pay any judgment in this case, a conclusion that would have supported a determination that a housing authority is an arm of the state.” (*Id.*, at p. 540.) The Ninth Circuit considers five questions when resolving Eleventh Amendment issues:

[W]hether a money judgment would be satisfied out of state funds, whether the entity performs central government functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. *Id.*, at p. 533.

Here, the Legislature has specifically disclaimed any liability for the acts of the Commission or its contracts. (Food & Agr. Code, § 78657.) The operations of the Commission are funded not by industry assessments. (§ 78676.) The Commission must even reimburse the Secretary for any expenses incurred in carrying out his duties toward the Commission. (§ 78644.) Clearly, the Commission is financially independent from the State, which cannot be held liable for Commission debts as a matter of law.

Consideration of additional factors also leads to the conclusion that the Commission is not a state is not subject to competitive bidding requirements: The Commission serves not a central government function, but rather supports a private industry whose well-being indirectly benefits the people of the state. (§§ 78609.) The Commission can sue and be sued. (§ 78652.) And the Commission was specifically created as a corporate body with all the powers of a corporation. (*Ibid.*)

substantial compliance and, in any event, there have been no demonstrated improprieties, overcharges or lack of transparency.

Public Records Act

The Commission acknowledges that its records should have been more readily accessible to the public in organized fashion and will agree to improve in the future. However, the Commission has responded to all Public Records Act requests, produced thousands of documents in connection therewith, and has not intentionally withheld public information from anyone.

In addition, plaintiff in the *Gonzales* litigation has made allegations that documents either have been withheld or were too heavily redacted in the Commission's production of roughly 10,000 documents to its counsel under the Public Records Act. Counsel for the Commission requested a complete copy of what the Commission produced to Gonzales' counsel before a system of bates-stamping began to be employed, at counsel's expense, to review that portion of the production with a view toward resolving any issues. Those documents produced with bates-stamps had little redaction, if any, and are easily tracked. However, several people were involved in the prior, initial production and, for those documents produced prior to the use of bates stamping, there is some confusion. Gonzales' counsel initially agreed but has since refused the Commission's review of the documents. The Commission and its counsel remain willing to review the earlier production and to remedy, if necessary and appropriate, any omissions in production, if any, and any redactions which may be removed, if any.

Auto Allowances

As summarized by the independent auditor:

The CDFA's draft audit criticizes the Tomato Commission for paying monthly car allowances and not including these car allowances on W-2s. The Draft Audit Report recommends that the "proper taxing authorities" ensure that taxes are paid on any employee car allowances.

In this regard, Internal Revenue Service Form 2106 provides a detailed explanation of how to report, on an employee's personal tax return, the allocation between miles driving for business use and personal use when the employee receives an untracked car allowance. Although employee car allowances should be included on a W-2 form, the employee nevertheless can utilize Form 2106 to report a car allowance.

Employees A and C received automobile allowances which were reported on Form 2106. Please see Exhibit T. While the employees do not wish for their tax documents to be part of the public record, they are willing to verify this information by submitting the actual forms and back-up on a confidential, non-public basis.

Pregnancy Leave Policy

The Commission again acknowledged that the documentation of its employee policies was confusing. However, for the 311.76 hours which were coded as Employee D's maternity leave, she worked 113.5 hours. Of the remaining 198.26 hours, Employee D had sufficient sick leave and vacation time to cover the additional hours. Thus, there was no overpayment to Employee D and the Commission Board has approved the payment and determined not to seek reimbursement.

Key Recommendations

- Although not listed as a key recommendation, the Commission has sought reimbursement from the Exchange of items identified by the auditors.
- Due to the seriousness of the issues raised, the Commission should contact the proper authorities so that investigations into these issues may be performed.

The Commission's investigation has not indicated to the Commissioners that the Commission's employees engaged in any conduct that was intentional, in bad faith, or otherwise inconsistent with the Commission's statutory purpose.

Accordingly, and in light of this response, the Commission does not believe that any referrals are warranted or would serve the ends of justice.

- The Commission should ensure all conference related income and expenses are fully disclosed at gross in the annual budgets submitted to CDFA for Concurrence and the financial statements sent to all assessment payers.

The Commission does not object in principle to a change in the reporting of conference-related expenses, so long as it comports with applicable accounting standards. Please see Response of Commission's independent auditor, Jeffrey Carter in his separate submission.

- The Commission should review all prior year conference related expenses and determine the total amount spent on the family members and friends of employees and the personal amounts spent by employees. The Commission should establish an accounts receivable and seek reimbursement of these expenses.

The Commission has requested and received from the employees in issue a breakdown of family related expenses. The Commission has accepted the offer of Employee A, without any admission of liability on his part, to reimburse his family-related expenses in connection with the conferences. The Commission has determined, as discussed above, that it does not believe it would be in the best interests of the Commission to pursue legal action against the remaining employees.

- The Commission should operate their business activities in the best public interest.

The Commission agrees to this recommendation.

- The Commission should keep adequate support for all expenses incurred. At the very least the Commission should ensure that a receipt/invoice is kept on file along with the names/business conducted, if appropriate.

The Commission agrees to this recommendation.

- Prior to contracting for the use of a private aircraft for travel related purposes, the Commission should perform a detailed cost-savings analysis that documents and demonstrates the necessity and benefit expected in using assessment dollars" to charter a private aircraft. The analysis should clearly identify the savings expected to occur in chartering a private aircraft versus other travel options.

The Commission agrees to this recommendation.

- The Commission should not allow its staff to use Commission credit cards for personal use.

The Commission agrees to this recommendation.

- The Commission should strengthen its internal controls over the use of these credit cards.

The Commission agrees to this recommendation.

- The Commission should contact the federal government to determine the "appropriateness" of the use of federal funds, specifically as it relates to Board Member A and Company C.

The Commission has contacted its liaison to the Federal Market Access Program which has confirmed that the expenditure was appropriate and does not believe that a referral is warranted.

- The Commission should verify that the total salary paid to Employee A from 2003 through 2006 is appropriate.

The Commission agrees to this recommendation and has done so.

- The Commission should collect reimbursement from any employee who was paid for their vacation time in violation of their own internal policy.

The Commission does not believe it is in its best interests to pursue legal action against the employees.

- The Commission should seek further guidance from the proper authorities on handling a violation of an open meeting law. The Commission should disclose all business meetings to the public in accordance with the appropriate open meeting laws.

The Commission agrees that it should disclose all business meetings to the public in accordance with appropriate open meeting laws, but believes it has done so.

- The Commission should seek guidance from the proper authorities as it relates to its violation(s) of the Public Contracts Code.

The Commission does not believe it has violated the Public Contracts Code, if it even applies to the Commission.

- The Commission should ensure all executive committee minutes are signed and dated by one of the three Board Elected Officer's along with the President of the Commission.

The Commission agrees to this recommendation.

- The Commission should ensure that all official accounting records, including certified ☐ copies of Board Minutes are centrally located and easily accessible to the public.

The Commission agrees to this recommendation.

- The Commission should adhere to the rules of the Public Records Act. In order to accomplish this, the Commission should have all records readily available to the public.

The Commission agrees to this recommendation.

- The Commission should contact the proper taxing authorities to ☐ ensure the Commission properly tracked and reported its employee's car allowances. Furthermore, the

Commission should require that employees submit monthly travel logs that indicate the business mileage driven and/or the actual maintenance incurred.

The Commission believes, based upon the information provided, that the car allowances have been properly reported. The employees in question have personal records which support the allowances. Notwithstanding, the Commission agrees to this recommendation.

- The Commission should contact the proper authorities responsible for determining whether the amounts paid to Employee D are appropriate. This will ensure that the Commission is not providing Employee D with a gift of public funds.

The Commission has determined with the assistance of legal employment counsel that the amounts paid were appropriate.

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Conclusion

The California Tomato Commission has responded in good faith to the Audit Report and stands ready to discuss its response and address any remaining concerns the CDFA may have.

Dated: February 16, 2007

Respectfully submitted on behalf of the California
Tomato Commission

By: Kathleen A. Meehan
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